



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 31, 1996

Mr. Mark T. Sokolow
City Attorney
City of Port Arthur
P.O. Box 1089
Port Arthur, Texas 77641-1089

OR96-0839

Dear Mr. Sokolow:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 40148.

The City of Port Arthur Police Department (the "department") received a request for various information relating to a shooting death involving two off-duty police officers. The department asserts that the requested information may be withheld pursuant to sections 552.102, 552.103, and 552.108 of the Government Code. You have submitted as responsive to the request only a memorandum regarding the findings of the Shooting Review Board.¹

Section 552.102 protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). For information to be protected from public disclosure under the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Having reviewed the document submitted in response to the requested information, we can find no information which could be considered highly intimate and embarrassing. Therefore, we conclude that none of the requested information may be withheld under section 552.102 of the Government Code.

To secure the protection of section 552.103(a), the "litigation" exception, a governmental body must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Section 552.103(a) requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551 (1990), and when a person hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990). Although you state that the department "expects litigation," you offer no evidence that this expectation is reasonable. We note that no threat of litigation is made by the attorney-requestor in his letter requesting the information. As you have provided no other information, we conclude that litigation is neither pending nor reasonably anticipated and you may not rely upon section 552.103 to withhold any of the requested information.

Section 552.108 excepts from disclosure:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution

When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. Certain factual information, which is generally found on the front page of police offense reports, is public even during an active investigation. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) at 3-4 (listing factual information available to public). In closed cases, the governmental body must demonstrate that release of the information would unduly interfere with law enforcement or prosecution before it can withhold the information under section 552.108. Open Records Decision Nos. 518 (1989), 216 (1978) at 4.

Moreover, the agency claiming an exception under 552.108 must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would unduly interfere with law enforcement. *See* Open Records Decision No. 434 (1986) at 3. You do not indicate whether any investigation or prosecution is pending nor have you demonstrated how release of this information would unduly interfere with law enforcement or prosecution. Consequently, you may not rely on section 552.108 to withhold the requested information.

Finally, the Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 of the act excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Assuming that the City of Port Arthur is a "civil service municipality," section 143.089 of the Local Government Code is applicable. Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 916 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *Id.* at 949. Therefore, assuming again that the City of Port Arthur is a civil service municipality, information maintained by the department which relates to an investigation that does not result in disciplinary action must be withheld from required public disclosure under section 552.101 of the act in conjunction with section 143.089(g) of the Local Government Code.² However, if the internal affairs investigation did result in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a) and must be released by the civil service commission under section 143.089(f) of the Local Government Code.

²We note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref: ID# 40148

Enclosures: Submitted documents

cc: Mr. Bradley R. Marshall
Attorney at Law
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(w/o enclosures)